Office-Supreme Court, U.S.
FILED
OCT 12 1959
JAMES R. BROWNING, Clerk

In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 403

MARINE COOKS & STEWARDS, AFL, a voluntary association, JAMES O. WILLOUGHBY, VIRGIL ROGERS and WILLIAM RICHARDS,

Petitioners.

vs.

PANAMA STEAMSHIP COMPANY, LTD., a corporation, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of District Judge Boldt appears in the Record at pages 118-128. It is reported at 1959 A.M.C. 340.

The opinion of the Court of Appeals for the Ninth Circuit, by Circuit Judge Orr, is reported at 265

F. 2d 780, with the concurring opinion of Circuit Judge Pope following at 265 F. 2d 787. Both form Appendix B to the petition. The *per curiam* opinion of the Court of Appeals denying rehearing is not yet reported, but appears as Appendix C to the petition.

STATEMENT OF THE CASE

The SS NIKOLOS was a merchant vessel registered under the Liberian Flag. It arrived at the Port of Tacoma, Washington on June 10, 1957, to discharge a full cargo of bulk salt which it had loaded in Mexico. (Findings V and VII, R. 32, 33)

It was intercepted in the harbor by the WILL-O-BEE, a small cabin cruiser owned and operated by some of petitioners. This began to circle about the NIKOLOS displaying signs "PICKET BOAT" (Findings IX and X, R. 33). Later an additional sign was displayed reading, "AFL-CIO seamen protest loss of their livelihood to foreign flag ships with sub-standard wages or sub-standard conditions" (R. 60).

Petitioners also threatened the consignee of the cargo with establishment of a picket line at its dock if it allowed the NIKOLOS to berth there (Finding XI, R. 33).

Petitioners' activities had their intended effect: the consignee of the salt refused the ship a berth at its dock, tugs declined to assist the vessel to a berth, and the NIKOLOS was forced to remain at anchor in the harbor (Findings XII, XIV and XV, R. 34).

Respondents Panama Steamship Company, Ltd., Seatankers, Inc. and Socrates Paleocrassas, respectively the owner, time charterer and master of the NIKOLOS (Findings I, II and III, R. 31), then filed a complaint (R. 3-10) in the United States District Court for the Western District of Washington, Southern Division, seeking damages and temporary and permanent injunctive relief against petitioners. An order to show cause why a temporary injunction should not be granted issued (R. 22-23) and extensive hearings were held, at which petitioners' sole contention was that the existence of a "labor dispute" within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq, deprived the Court of jurisdiction to issue an injunction.

The evidence was that no dispute of any kind existed between respondents and the members of the NIKOLOS' crew (R. 14). Petitioners did not even claim that there was and expressly disclaimed any contact or affiliation with the crew members (R. 28).

Rather, petitioners' contention was based on the undisputed facts that their activities were without fraud or violence (Finding XXIII, R. 36) and that, as a result of the shipment of salt from Mexico aboard the NIKOLOS and proposed shipments aboard other foreign flag vessels, American flag vessels manned under contracts with American unions had lost or would lose such business with resultant loss of employment opportunities to members of these American unions, including petitioner Marine Cooks and Stewards (Finding XXIV, R. 36-37).

The Court found, however, that the owner and

charterer of the vessel were both foreign corporations (Findings I and II, R. 31), the master, officers and crew of the NIKOLOS all aliens serving under articles subject to the laws of Liberia (Finding VI, R. 32) and that petitioners' activities constituted "acts of unlawful interference with international commerce and particularly the right of plaintiffs to carry out an international voyage and maritime contract of affreightment with a vessel lawfully registered by a friendly foreign nation manned by an alien crew under foreign shipping articles" (Finding XIII, R. 34). It concluded that "the term 'labor dispute' as used in the Norris LaGuardia Act does not contemplate a dispute foreign in nature" (Conclusion II, R. 37).

Finding substantial and irreparable damage to respondents (Findings XV, XVII, R. 34, 35), as well as irreparable damage to the obligations and relations of the United States with friendly maritime nations (Finding XVIII, R. 35) and that no remedy existed at law (Finding XXI, R. 36), the District Court issued an interlocutory injunction (R. 40-43). At the request of petitioners' counsel (R. 134), this enjoined picketing or otherwise interfering with discharge of cargoes not only from the NIKOLOS but also from other foreign flag vessels, manned by aliens under foreign articles and owned, operated or chartered by respondents.

Appealing from this, petitioners again placed sole reliance on the Norris-LaGuardia Act (R. 137). The Court of Appeals for the Ninth Circuit found, as this Court had of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 et seq in *Benz*

v. Compania Naviera Hidalgo S.A. (1957), 335 U.S. 138, that, "the whole background of the Act is concerned with industrial strife between American employers and employees," and held the Act inapplicable to labor conditions aboard the foreign vessel and between the foreign employer and foreign employees involved here.

The Court of Appeals also dealt with a contention that the District Court lacked jurisdiction of the complaint, which petitioners had raised by supplemental briefs and in oral argument. It found jurisdiction under 28 U.S.C. § 1331, holding that the case arose under the Constitution and laws of the United States because of the federal nature of respondents' maritime rights and petitioners' maritime actions. It distinguished *Romero v. International Terminal Operating Co.* (1959), 358 U.S. 354, since Admiralty jurisdiction, there held to be the exclusive federal jurisdiction of a remedy by damages, is entirely lacking of the injunctive remedy here sought.

By petition for rehearing, petitioners for the first time challenged the District Court's finding that respondent Seatankers, Inc. was a foreign corporation and also for the first time contended that the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52, prevented their conduct from being unlawful. By *per curiam* opinion the Court of Appeals held these questions not properly before it, but left them for consideration of the District Court in proceedings for damages or permanent injunctive relief.

Petitioners seek to present all these questions to the Supreme Court, whether considered below or not.

ARGUMENT

I. Certiorari Should be Denied in View of the Interlocutory Nature of the Judgment Below.

This Court has long adhered to a policy against certiorari to review interlocutory orders—even when the questions are deemed important enough to warrant certiorari after final judgment and are jurisdictional in nature. *Indianapolis v. Chase National Bank* (1941), 314 U.S. 63, 86 L. ed. 47; 62 S. Ct. 15, makes this clear. The District Court there dismissed the complaint for want of jurisdiction. The Circuit Court of Appeals found diversity jurisdiction and reversed for trial. Certiorari was denied at that point. But, after a final judgment was entered for the plaintiff, certiorari was granted "because of the important jurisdictional issue involved in the litigation," 314 U.S. at p. 72, and the judgment reversed.

There is a particularly good reason for following that policy in this case. Petitioners now seek to make both a contention of fact and an argument of law not properly presented or considered below. They should, therefore, not be considered by this Court now, but left for review after final development of them in the District Court as directed by the Court of Appeals.

II. The Answer to the First Question Petitioners Seek to Present Was Correctly Given Below and Is of Little Importance.

Petitioners urge that there is a conflict between the decision below and *Romero v. International Terminal*

Operating Co. (1959), 358 U.S. 354, 3 L. ed. 2d 368, 79 S. Ct. 468. This Court was unanimous in *Romero* in agreeing that a seaman's claim for damages due to unseaworthiness was governed by substantive federal maritime law. A minority of the Court felt that the case, therefore, arose "under the Constitution or laws of the United States" within the meaning of the Judiciary Act of 1875, now 28 U.S.C. § 1331, granting the District Courts jurisdiction of all suits of a civil nature at common law or in equity so arising. The opinion of the Court held, however, that such coverage was not intended for two reasons:

> "The provision of the Act of 1875 with which we are concerned was designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789. We have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty law from the beginning. The federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law." (3 L. ed. at 380)

> "The historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal, would be taken away by an expanded view of Sec. 1331, since saving-clause actions would then be freely removable under Sec. 1441 of Title 28. The interpretation of the Act of 1875 contended for would have consequences more deeply felt than the elimination of a suitor's traditional choice of forum. By making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters—a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve." (3 L. ed. 2d 382)

The decision of the Court of Appeals in this case followed *Romero* in holding that the tortious conduct of petitioners on navigable waters and infringing respondents' maritime rights was governed by substantive federal law. However, the Court of Appeals found the reasoning of this Court in *Romero* inapplicable to exclude this case from the jurisdiction granted by 28 U.S.C. § 1331, because of the uniform line of decisions denying jurisdiction in Admiralty to grant affirmative equitable relief, and particularly injunctive relief. See 265 F. 2d at 783-786, Appendix to Petition at 10-15.

Thus, the Judiciary Act of 1875 in granting jurisdiction of equity cases such as this to the lower federal courts was not duplicating a "long established and smoothly functioning" jurisdiction in which "federal admiralty courts had been completely adequate." Rather, it was for the first time providing a federal forum "for vindicating every right given by the Constitution, the laws and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court 65 (1927).

Likewise, there is here no conflict with the "saving clause" reservation to suitors of a right to pursue a common law remedy in state courts. Recognizing that cases for equitable relief were not within Admiralty jurisdiction, much less exclusively within it, the saving clause makes no reference to them. The Judiciary Act of 1875 does, and it inclusion of cases such as this cannot be interpreted away by the reasoning of *Romero*.

While highly interesting to a legal scholar, the distinction between this case and *Romero* is of too limited

importance to justify certiorari. In maritime matters where equitable relief may be important diversity jurisdiction is generally present. Indeed, it would be present in this case but for the fact that Marine Cooks and Stewards, an unincorporated association having no citizenship, was sued as an entity. Diversity jurisdiction could easily have been obtained by a class suit against its members, naming as representatives only union members diverse from the plaintiffs. *Supreme Tribe of Ben Hur v. Cauble* (1921), 255 U.S. 356, 65 L. ed. 673, 41 S. Ct. 338; 2 Barron & Holtzoff, Federal Procedure, Sec. 569, p. 176. And a judgment in such a class suit would be equally binding on the association and its assets as one entered in this suit. *Tunstall v. Brotherhood of Locomotive Firemen* (CCA 8, 1948), 148 F. 2d 403.

III. The Decision of the Court Below that the Norris-LaGuardia Act Is Inapplicable to this Case Is Completely in Accord with the Decisions of this Court.

The court below held that the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq., was intended to apply only in disputes between American employers and American employees and did not comprehend the foreign employment situation here. This decision is in line with this Court's recent decisions finding domestic limitations to other acts of Congress: *Benz v. Compania Naviera Hidalgo S.A.* (1957), 353 U.S. 138, 1 L. ed. 709, 77 S. Ct. 699 (holding the Taft-Hartley Act inapplicable in a virtually identical situation); *Foley Bros. Inc.*

v. Filardo (1949), 336 U.S. 281, 93 L. ed. 680, 69 S. Ct. 571 (Federal Eight Hour Law not intended to govern work performed for an American contractor on U. S. bases in Iraq and Iran); *Romero v. International Terminal Operating Co.*, supra; and *Lauritzen v. Larsen* (1953), 345 U.S. 571, 97 L. ed. 1254, 73 S. Ct. 921, (the universal "any seaman" of the Jones Act construed not to cover foreign seamen employed on foreign flag vessels by foreign employers and respectively injured in American waters and foreign waters).

Petitioners seek to distinguish the *Benz* case. First, they argue, the facts are different. It is hard to see how they are significantly so. There, as here, there was a Liberian vessel temporarily present in an American port on one leg of an international voyage. There, as here, the vessel was owned by a foreign corporation and manned by an alien crew serving under articles opened abroad and to which foreign law was applicable. There, as here, the vessel was picketed by American unions proclaiming their own self interest. It is true that in *Benz* the members of the crew were also disputing with the shipowner over terms, tenure and conditions of employment and had asked the American unions to assist them. No such dispute is present here. How the evidence of that additional dispute would make American labor legislation inapplicable there but not here petitioners do not explain.

Petitioners seek to create a factual difference between *Benz* and this case by arguing that here the foreign corporate charterer of the vessel should be considered

American because of American ownership of its stock. No such claim was made at the District Court's hearings and petitioners did not object to the finding of the trial court that the charterer of the vessel was a foreign corporation (Finding II, R. 31). The Court of Appeals refused to consider this contention on rehearing because of failure to present it on the appeal; but noted in its opinion denying rehearing that,

> "In it statement of the case made by petitioner in its opening brief (page 3) reference to ownership and charter parties appear, from which no inference of American control can be logically drawn, indeed the inference is quite the opposite." (Appendix to the Petition at 20)

Even if the charterer were American, however, it should make no difference. Petitioners do not question that Panama Steamship Company, the owner of the vessel, was a Panamanian corporation (R. 73), owned by Greeks and with its principal office and place of business in London, England (R. 72-73). Nor is it questioned that the master and crew were hired and paid by the owner (R. 70-71). There is no evidence of any American connection with the vessel's owner except a series of charter arrangements culminating in the sub time charter for this particular voyage by a foreign subsidiary of an American concern. The time charter is not shown to have anything to do with employment relations aboard the vessel or to give the time charterer any control over them.

Petitioners next seek to distinguish *Benz* because of supposed differences between the Norris-LaGuardia

Act and the Taft-Hartley Act. They carefully avoid comparison of the language of the two Acts for obvious reasons. The definition of labor dispute in the Taft-Hartley Act is found in 29 U.S.C. § 152(9):

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

The definition of labor dispute in the Norris-LaGuardia Act is identical except for omission of the word "tenure", 29 U.S.C. § 113(c).

Similarly, both Acts contain recitals as to the inability of the individual workman to adequately protect his interest in relations with employers and declare a purpose to promote collective bargaining. Compare 29 U.S.C. § 102 with 29 U.S.C. § 151. So far as applicability to foreign commerce is concerned, the Taft-Hartley Act is specifically made applicable to commerce "between any foreign country and any state", 29 U.S.C. § 152(6), while the Norris-LaGuardia Act is entirely silent.

Thus nothing by definition of labor dispute, declaration of purpose or express reference to foreign commerce would indicate that Norris-LaGuardia should apply where Taft-Hartley was held not to apply in *Benz*.

Petitioners urge, however, that Norris-LaGuardia

springs from the plenary power of Congress to define jurisdiction of the lower federal courts and is procedural in nature, while Taft-Hartley springs from the commerce power and is intended to affect substantive relations. Contradicting themselves, petitioners cite *U. S. v. Hutcheson* (1940), 312 U.S. 219, 85 L. ed. 788, 61 St. Ct. 463, in which this Court found an implied amendment by the Norris-LaGuardia Act of the Clayton Act. Clearly a purely procedural act could not amend a substantive law applying to commerce and insofar as such an amendment was effected the Norris-LaGuardia Act must also spring from the commerce power. On the other hand, it is apparent that the Taft-Hartley Act is not concerned only with substantive rights, but is largely designed to effectuate procedures for promoting collective bargaining and had the effect of removing from the jurisdiction of both federal and state courts many cases vested exclusively with the Board.

Nothing seems clearer than the closely woven interrelationship of these two Acts designed to affect American labor relations. To hold one applicable and the other not would indeed have strange results, as the Court of Appeals noted in deciding this case,

> "If the Norris-LaGuardia Act was applicable here, the combination of such a holding and the holding in Benz that the Taft-Hartley Act administrative remedies are not available would result in there being no federal agency or court in which foreign commerce could seek protection. Such a result in the field of international commerce and relations should not be arrived at without more explicit direction from Congress." (265 F. 2d at 787. Petition Appendix at 17.)

Finally petitioners seek distinction in the fact that in *Benz* the substantive law of Oregon was applied while here substantive federal maritime law applies. The essence of their contention is that Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52, prevents their conduct from being a violation of any federal law, while the same argument would not apply with respect to violations of state law. As already noted, this contention was not timely made and therefore not considered below. The circular nature of the argument should, however, be pointed out.

Section 20 of the Clayton Act, 29 U.S.C. § 52, describes certain labor activities and concludes, "Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." That language was, however, promptly held to be applicable to the described activities, including picketing, only where they are engaged in by employees in a dispute with their own employer. *Duplex Printing Press Co. v. Deering* (1921), 254 U.S. 443, 65 L. ed. 349, 41 S. Ct. 172, 16 A.L.R. 196. There is no contention that there was any such dispute here. While the limits placed on the Clayton Act were broadened by the implied amendment made by enactment of the Norris-LaGuardia Act, as held in *U. S. v. Hutcheson*, supra, they could not have been thus enlarged beyond the scope of the Norris-LaGuardia Act.

Petitioners have the cart before the horse. They argue that the Norris-LaGuardia Act may apply because the Clayton Act applies, when in fact the appli-

cability of the Clayton Act first depends upon a finding that Norris-LaGuardia applies

As the court below held, it does not. There is no need for certiorari to affirm that holding in view of the guidance recently given in *Benz*, and which it follows.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

If, however, certiorari is granted by the Court, review should be limited to either or both of the questions properly presented and decided below:

1. Did the District Court have jurisdiction of the complaint?
2. Did the Norris-LaGuardia Act deprive the District Court, on the facts found by it, of jurisdiction to grant injunctive relief?

Respectfully submitted,

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